



**Upper Tribunal
(Immigration and Asylum Chamber)**

Appeal Number: IA/02732/2015

THE IMMIGRATION ACTS

**Heard at Field House
On 7 July 2016**

**Decision & Reasons
Promulgated
On 25 July 2016**

Before

DEPUTY UPPER TRIBUNAL JUDGE CHAPMAN

Between

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

v

**KHONDAKER BULBUL AHMED
(ANONYMITY DIRECTION NOT MADE)**

Respondent

Representation:

For the Claimant: Mr S Whitwell, Home Office Presenting Officer
For the Respondent: Mr C Sultan, Legal Representative instructed by Law Lane Solicitors

DECISION AND REASONS

1. The Claimant is a national of Bangladesh who appeals against the decision by the Secretary of State dated 2 January 2015 refusing to vary his leave

to remain in the UK as a Tier 4 (General) Student. His appeal came before First-tier Tribunal Judge Herlihy at a hearing on 18 December 2015.

2. The basis of the decision was that the Claimant had failed to submit a valid CAS due to the fact that his former Sponsor was no longer listed as a Tier 4 Sponsor when the Sponsor Register was checked on 2 January 2015 and thus the Claimant failed to satisfy paragraph 117 of Appendix A of the Rules and the application was refused under paragraph 245ZX(l) and (m). The Claimant was granted leave outside the Rules until 18 March 2014 which gave him 60 days in order to find a new Tier 4 Sponsor.
3. What then transpired is that the appeal was listed first before First-tier Tribunal Judge Rozanski on 22 July 2015 when it was adjourned with the judge issuing directions stating that a Section 120 notice had been submitted by the Claimant applying to vary the grounds of appeal on the basis that he had completed ten years' lawful residence in the United Kingdom and was thus eligible for the grant of indefinite leave to remain. No response was received from the Secretary of State in respect of this Section 120 notice and grounds and no response had been received by the time the appeal came before Judge Herlihy. The Secretary of State's representative was given time to check with the Home Office whether it would be possible for the Claimant to withdraw his current appeal and make a fresh application but the advice was that any new application would be refused as it would be out of time if the current appeal was withdrawn.
4. At 2.4 of her decision the judge records:

"It was agreed that the appeal would proceed but the Appellant's Representative accepted that the Appellant could not succeed under the Immigration Rules on the basis of his initial application for further leave to remain as a Tier 4 student as he did not have a valid CAS at the date of the application. The Appellant's Representative said that he would submit that the Appellant had satisfied the criteria for indefinite leave to remain on the basis of long residence and would make submissions on that basis."

The judge then proceeded at 8.5 of the decision as follows:

"I find that the decision is an interference with the Appellant's private life and is not proportionate given that the Appellant has a valid claim for leave which should be properly considered by the Respondent and I find that a short period of leave should be allowed to the Appellant so that he can submit his application for indefinite leave to remain based on his 10 years' residence which can be properly assessed and considered by the Respondent"

and she allowed the appeal at paragraph 10 on human rights grounds.

5. The Secretary of State then sought permission to appeal in time on 21 January 2016 on the basis that the judge materially misdirected herself in law firstly in failing to consider the application under the Rules pursuant to paragraph 276ADE; in giving no consideration and making no findings as to why the Claimant's private life in the UK as a student outweighs the public interest in maintaining immigration control and in failing to assess the proportionality of that decision. The judge materially misdirected herself in failing to consider Section 117 of the 2002 Act and her finding that the appeal succeeds under Article 8 is irrational and is made in an attempt to circumvent the lawful Immigration Rules.
6. Permission to appeal was granted on 7 June 2016 by Judge of the First-tier Tribunal Page on the basis that the judge appears to have allowed the appeal under Article 8 so the Claimant can be granted a short period of leave so he can make other applications.

Hearing

7. The appeal came before me for hearing on 7 July 2016 when the Secretary of State was represented by Mr Whitwell and the Claimant by Mr C Sultan. Mr Whitwell relied on the grounds of appeal submitting that at 6.3 the judge found that the Claimant was unable to satisfy the requirements of the Rule and made findings about the ability or otherwise to satisfy ten years' continuous lawful residence. He submitted that there was no reference to the private life provisions of the Rules or to the jurisprudence in relation to consideration of Article 8 outside the Rules e.g. SS (Congo). Nowhere in the decision was there reference to Section 117B of the 2002 Act or to the precariousness of the Claimant's private life or his ability to speak English and essentially at paragraph 8.2 the First-tier Tribunal Judge was utilising Article 8 as a general dispensing power which she was not permitted to do. He also drew my attention to the recent decision in Nasim which is a decision postdating Patel and where it was found at paragraphs [12] to [20] that private life was a very limited utility in cases involving students.
8. Mr Sultan responded to Mr Whitwell's submissions in general terms but ultimately submitted that the judge has a discretion and has tried to intervene in a way that the Home Office can now reach a decision in respect of the continuous long residence of the Claimant.
9. In responding Mr Whitwell pointed out, correctly, that the judge does not have the discretion to ignore the Immigration Rules. The decision in this case by the Secretary of State was made on 2 January 2015 and by that time both Tier 4 cases were already subject to the amended Section 82 grounds which came into force in October 2014. The only grounds available to the Claimant were protection based or in relation to human rights.

Notice of Decision

10. I find that the First-tier Tribunal Judge did err materially in law in that she was not entitled to come to the decision she did in the way that she did for the reasons set out by the Secretary of State in the grounds of appeal and elaborated upon by Mr Whitwell before me today.
11. Whilst it is the case that arguably the Claimant has now amassed ten years' continuous lawful residence, this is an application that can be made by payment of a fee on the specified form to the Home Office to consider at any time after that period of ten years has been completed. In light of my finding that the judge erred in allowing the appeal under Article 8, I find that there is little point in remitting the appeal or adjourning it for further consideration given that the clear way forward for the Claimant if he wishes to proceed to remain in the United Kingdom is to make an application to the Home Office in the manner suggested above. I therefore allow the appeal by the Secretary of State for the Home Department with the effect that the Claimant's appeal is dismissed.
12. I do not make an anonymity order.

Signed

Date **25 July 2016**

Deputy Upper Tribunal Judge Chapman